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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 EARNEST ALEXANDER,) No. CV 18-5505 DOC (FFM)
12 Petitioner,)
13 v.) ORDER TO SHOW CAUSE WHY THE
14 STU SHERMAN, Warden,) PETITION SHOULD NOT BE
15 Respondent.) DISMISSED AS UNTIMELY
16

17 On June 11, 2018, petitioner Earnest Alexander (“petitioner”)
18 constructively¹ filed a Petition for Writ of Habeas Corpus by a Person in State
19 Custody (the “petition”) pursuant to 28 U.S.C. § 2254. (Docket No. 1.) The
20 petition challenges petitioner’s 2009 conviction in the Superior Court of Los
21 Angeles County for various crimes.

22 **1. LIMITATIONS PERIOD FOR FEDERAL HABEAS PETITIONS**

23 The present proceedings were initiated after the April 24, 1996, effective
24 date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L.
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27 ¹ A pro se petitioner’s relevant filings may be construed as filed on the date
28 they were submitted to prison authorities for mailing, under the prison “mailbox
rule” of *Houston v. Lack*, 487 U.S. 266 (1988). Here, the Court will presume
that petitioner presented the petition for mailing on the day he signed it, June 11,
2018. (See Docket No. 1 at 8.)

1 No. 104–132, 110 Stat. 1214 (1996). Accordingly, AEDPA’s timeliness
2 provisions apply, including a one-year limitations period which is subject to both
3 statutory and equitable tolling. *See* 28 U.S.C. § 2244(d)(1). For those prisoners
4 whose convictions became final post-AEDPA, the one-year period starts running
5 from the latest of four alternative dates set forth in 28 U.S.C. § 2244(d)(1)(A)-
6 (D). *See, e.g., Patterson v. Stewart*, 251 F.3d 1243, 1245–47 (9th Cir. 2001).

7 The petition’s allegations do not demonstrate that petitioner is entitled to
8 any of the start dates in subsections (d)(1)(B) through (d)(1)(D) of Section 2244.
9 Accordingly, the Court applies subsection (d)(1)(A) to the petition. Under that
10 subsection, the one-year limitations period “shall run from the latest of . . . the
11 date on which the [petitioner’s conviction] became final by the conclusion of
12 direct review or the expiration of the time for seeking such review.” Where, as
13 here, the challenged judgment was affirmed by the state’s highest court, the
14 period of direct review ends either when the petitioner failed to file a *certiorari*
15 petition in the United States Supreme Court and the 90-day period for doing so
16 has expired, or when the Supreme Court has ruled on a filed petition. *See Clay v.*
17 *United States*, 537 U.S. 522, 527-32 and nn.3-4, 123 S. Ct. 1072, 155 L. Ed. 2d
18 88 (2003); *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001).

19 The California Supreme Court denied petitioner’s petition for review on
20 June 8, 2011, and petitioner did not seek review in the United States Supreme
21 Court.² Thus, for the purposes of section 2244(d)(1)(A), petitioner’s conviction
22 became final on September 6, 2011, ninety days after the California Supreme
23 Court affirmed his conviction. Accordingly, the one-year limitations period was
24 set to expire on September 6, 2012. *See Patterson*, 251 F.3d at 1245-47.

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26 ² The Court takes judicial notice of petitioner’s state court proceedings as
27 indicated on the California Courts of Appeal official case information website,
28 found at <http://appellatecases.courtinfo.ca.gov/index.html>. *See Porter v. Ollison*,
620 F.3d 952, 954–55 (9th Cir. 2010) (federal courts may take judicial notice of
state court dockets found on the internet).

1 Because petitioner did not initiate the current proceedings until June 11, 2018,
2 the present action is untimely, absent statutory or equitable tolling. *See* 28
3 U.S.C. § 2244(d)(1).

4 **2. STATUTORY TOLLING**

5 Under 28 U.S.C. § 2244(d)(2), “[t]he time during which a properly filed
6 application for state post-conviction or other collateral review with respect to the
7 pertinent judgment or claim is pending shall not be counted toward any period of
8 limitation under this subsection.” The statute of limitations is not tolled between
9 the date on which a judgment becomes final and the date on which the petitioner
10 files his first state collateral challenge because there is no case “pending.” *Nino*
11 *v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). However, a state habeas petition
12 filed before a petitioner’s conviction is final may toll limitations period,
13 effectively delaying the initiation of the limitations period during the time the
14 petition is pending. *Jimenez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (citation
15 omitted).

16 Here, petitioner did not file any state habeas petitions before September 6,
17 2012. Petitioner did file a habeas petition in the California Court of Appeal,
18 Second Appellate District on May 27, 2016, and a habeas petition in the
19 California Supreme Court on May 22, 2017. As these state habeas petitions were
20 filed after the September 6, 2012 expiration of the AEDPA limitations period,
21 they do not provide petitioner with statutory tolling. *See Nino, supra*.

22 **3. EQUITABLE TOLLING**

23 The AEDPA limitations period also may be subject to equitable tolling, if
24 the petitioner shows that extraordinary circumstances beyond the petitioner’s
25 control made timely filing of a federal habeas petition impossible and the
26 petitioner has acted diligently in pursuing his rights. *Holland v. Florida*, 560
27 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). The petitioner bears

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1 the burden of showing that equitable tolling is appropriate. *Miranda v. Castro*,
2 292 F.3d 1063, 1065 (9th Cir. 2002).

3 Petitioner has made no showing of extraordinary circumstances or
4 diligence. Therefore, he has not demonstrated that equitable tolling is
5 appropriate in this case.

6 **4. ORDER TO SHOW CAUSE**

7 Because the petition does not demonstrate any basis for tolling the
8 limitations period, or for setting aside the one-year limitation, the Court orders
9 petitioner to show cause in writing within **thirty (30) days** of the date of this
10 order why the petition should not be dismissed as time-barred. If petitioner fails
11 to provide a timely response to this order, the Court will recommend that the
12 petition be dismissed, with prejudice, as time-barred.

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14 IT IS SO ORDERED.

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16 DATED: June 25, 2018

17 /S/ FREDERICK F. MUMM

18 FREDERICK F. MUMM
19 United States Magistrate Judge
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